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No. 97-640

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AMERICAN CITIGAS CO.,
Petitioner,

v.

VORYS, SATER, SEYMOUR AND PEASE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the particular circumstances of this case, the district court abused its discretion when it exercised jurisdiction over a lawsuit seeking more than $2.1 million in money damages as well as a declaration of rights.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties. Petitioner American Citigas Co. was the defendant in the district court; respondent Vorys, Sater, Seymour and Pease was the plaintiff.

Pursuant to Rule 29.6 of the Rules of this Court, respondent Vorys, Sater, Seymour and Pease states that it is a partnership and has no parent companies or subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

This case does not present the question stated in the petition for certiorari, and the Sixth Circuit's unpublished opinion does not implicate any circuit split. Here, the law firm of Vorys, Sater, Seymour and Pease ("Vorys") sought and won not only a declaration of its right to retain legal fees that it had already collected, but also a money judgment of more than $2.1 million in fees that remained unpaid. No circuit in the country would have held that the district court abused its discretion when it exercised the diversity jurisdiction conferred upon it by Congress and the Constitution. Even the Fifth and Ninth Circuits, on which the petition's claim of a circuit split rests, have made clear that when a plaintiff is seeking not only declaratory relief but also damages in an amount sufficient to provide an independent basis for diversity jurisdiction, the district court has a virtually unflagging obligation to exercise its

jurisdiction despite the pendency of parallel state proceedings. *See, e.g., Polido v. State Farm Mut. Auto. Ins. Co.*, 110 F.3d 1418, 1421 (9th Cir. 1997); *Southwind Aviation v. Bergen Aviation*, 23 F.3d 948, 951 (5th Cir. 1994).

Even if Vorys really had brought a pure declaratory judgment action and had not been seeking contract damages, this case still would not have implicated any circuit split over the proper application of *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). Although petitioner American Citigas Company ("ACC") incorrectly asserts that the Fifth and Ninth Circuits generally forbid district courts to exercise diversity jurisdiction over pure declaratory judgment actions when parallel actions are pending in state court, *Wilton* and the text of the Declaratory Judgment Act give district courts "unique and substantial discretion" in this regard. *Id.* at 286. ACC does not cite a single Fifth Circuit case that post-dates *Wilton*, and the Fifth Circuit recently noted that "[a] district court has broad discretion to retain or dismiss a declaratory judgment suit where a parallel state court suit has been filed." *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 84 (5th Cir.), *cert. denied*, 118 S. Ct. 69 (1997). As for the Ninth Circuit, the line of cases cited by ACC is confined to insurance disputes, which raise special issues under the McCarran-Ferguson Act; in any event, the Ninth Circuit is taking steps to reconsider that line of cases *en banc*.

Finally, even if the Ninth Circuit were willing to apply its panel decisions to *all* declaratory judgment actions (rather than just to cases seeking coverage opinions or raising other questions of insurance law), and even if this case really were a declaratory judgment action, the Ninth Circuit's decisions specifically acknowledge that the circumstances of any particular case may warrant the exercise of federal jurisdiction. *See, e.g., Employers Reins. Corp. v. Karussos*, 65 F.3d 796, 798 (9th Cir. 1995); *cf.* Pet. i (conceding that "extraordinary circumstances"

will justify the exercise of jurisdiction). Here, the district court expressly found "unique circumstances" justifying its exercise of jurisdiction. Pet. App. 23a. ACC is therefore reduced to attacking the factual basis for the district court's finding. *See, e.g.*, Pet. 7-8. The record amply supports the district court's finding of "unique circumstances" making this case appropriate for resolution in federal court,[1] and the accuracy of that finding is not a cert-worthy issue.

COUNTERSTATEMENT OF THE CASE

In 1991, ACC—then a small Ohio corporation called Energy Buyers Service Corporation—asked Vorys to represent it in a pending arbitration proceeding against the mammoth USX Corporation. Sixth Circuit Joint Appendix ("C.A. App.") 270. Vorys agreed to represent ACC on a contingency-fee basis. The letters setting forth the agreement between Vorys and ACC called for Vorys to receive roughly 25% of any "recovery" on the claim that had been submitted to arbitration, and expressly indicated that Vorys would receive its contingent fee for "any payment on or attributable to" that claim. *Id.* at 133.

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[1] Relevant considerations include the following: (1) the parties' dispute grew out of Vorys's representation of ACC in proceedings before the federal district court and concerned the proper allocation of settlement proceeds that had been distributed under the district court's supervision; (2) although ACC had secretly filed (but not served) an action in Texas state court the day before Vorys sought to invoke federal jurisdiction, ACC initially concealed this action from both Vorys and the district court; (3) Texas had little connection to the dispute between ACC and Vorys, which was governed by Ohio law; (4) no parallel or related proceeding had ever been filed in the courts of the state whose law was at issue; (5) it is unclear whether the Texas courts even had personal jurisdiction over Vorys; and (6) even if ACC's Texas action technically commenced on the day of its filing (which is unclear in light of the lag in service), the Texas action had been "virtually inactive since it was filed," Pet. App. 21a, and in realistic terms the federal court was far ahead on the learning curve.

In proceedings held in Columbus, Ohio, the arbitrator found USX liable to ACC, and in December 1992 he awarded ACC the principal sum of $116,807,768. *Id.* at 274-275. On behalf of ACC, Vorys filed and briefed an action in the United States District Court for the Southern District of Ohio to confirm the arbitral award. *See* 9 U.S.C. § 9. Unbeknownst to Vorys, however, ACC's president—Robert Silverthorn, Sr.—was already considering ways to try to avoid paying Vorys its full contingent fee. Only six weeks after Vorys had won the largest award in American Arbitration Association history for his previously impecunious company, Silverthorn indicated to his son that he was thinking about discharging Vorys. In a contemporaneous memo, Silverthorn's son—who was himself a lawyer and who served as ACC's general counsel—described his reaction:

> I remained silent so as not to engage in a heated exchange on the way to the airport. I have steadfastly taken the position with Dad that VSSP is entitled to their 25% and no contribution should be asked from them with regard to any expenses that VSSP must absorb with regard to any other claim. I feel that Dad is absolutely without legal or moral support for this position and it is an embarrassment to me for him to be pursuing this kind of illogic.

C.A. App. 979.

Meanwhile, Vorys was diligently litigating the federal action to confirm the arbitration award. Confirmation was not certain, because the enormous award "could fairly be characterized as a windfall." Pet. App. 27a. In October 1993, John Elam—Vorys's most senior trial lawyer—presented oral argument in favor of confirmation. C.A. App. 277. With ACC's express authorization, Elam subsequently entered into settlement negotiations with Dan Sandman, USX's general counsel. *Id.* at 1006.

Elam was scheduled to meet with Sandman on November 23, 1993. On November 22, 1993, Elam and John

Keller (another Vorys lawyer) had a long meeting with Silverthorn and his wife. The outcome of the meeting is disputed. Elam and Keller state that Silverthorn expressly authorized Elam to offer a $103.75 million settlement, under which USX would pay ACC $95 million on December 23, 1993, and would make an additional $8.75 million in matching charitable contributions at ACC's direction. *Id.* at 636, 714. Silverthorn claims that he merely authorized Elam to try to induce USX to make such an offer. *Id.* at 1012.

At their meeting the next day, Elam and Sandman reached an agreement in principle to settle the case on these terms. Elam called Silverthorn from the airport to relay the good news. Silverthorn expressed displeasure that USX had agreed to back its payment obligations with a confession of judgment rather than a letter of credit. Pet. App. 29a; C.A. App. 672, 324. That evening, Silverthorn faxed Elam a one-sentence letter (which Silverthorn himself did not sign) stating that Elam had acted without authority and "had better undo" the deal. *Id.* at 677.

Rather than simply scuttling an authorized $103.75 million deal on the strength of this terse and inaccurate fax, Elam and Keller sought to discuss the matter with Silverthorn, but he went incommunicado. *Id.* at 281, 323-331. In the meantime, USX's lawyers sent Vorys a draft of a proposed written settlement agreement. Vorys and Silverthorn's son (who was also acting as counsel for ACC) commented upon and exchanged several drafts with USX's lawyers during this period, but USX was aware of the potential problem and knew that any new terms not covered by the November 23 agreement in principle would require ACC's approval. *Id.* at 281, 641, 858, 864, 867.

Ultimately, Silverthorn tried to consummate the extremely favorable settlement while avoiding Vorys's contingent fee. On December 9, 1993, Silverthorn—having

received the most recent version of USX's draft settlement agreement—met with USX's president over lunch. For tax reasons, Silverthorn asked USX to defer the bulk of the $95 million payment until January 3, 1994, which USX agreed to do. Pet. App. 31a. Other aspects of the meeting are disputed, but there is no dispute that Silverthorn eventually shook hands with USX's president on the deal. *Id.* After USX's president left, Silverthorn personally made significant changes to the draft agreement (including striking out entire pages of terms) and then signed it. *Id.*; C.A. App. 1129-1150.

On December 10, 1993, Silverthorn's son and Keller went to Pittsburgh to deliver the executed agreement to USX. Although Silverthorn now claims that he orally discharged Vorys on the evening of December 9, he concedes that his son had his express authority to deliver the agreement and to act as ACC's legal representative in Pittsburgh. *Id.* at 416, 919. At the Pittsburgh meeting, USX announced that it would not proceed with the settlement unless all of ACC's shareholders executed releases of any personal claims that they might have against USX. *Id.* at 922. Silverthorn's son recognized that this demand "created a substantial addition to the terms of the settlement" and gave ACC an opportunity to walk away from the deal. *Id.* at 922-923, 938. The demand "spawned a whole set of telephone calls and exchanges" with his father in Houston, because it "created an opportunity to maybe start all over again." *Id.* at 922. Rather than allowing the potential settlement to founder on USX's demand, however, Silverthorn and ACC's other shareholders provided the requested releases. *Id.* at 924-925, 1155.

On the same day that he and his wife signed the releases demanded by USX, Silverthorn expressly conceded that he was ratifying Vorys's allegedly unauthorized acts. In a letter to Elam, Silverthorn acknowledged ACC's "ratification of the transactions with USX made by you," but asserted cryptically (and erroneously as a matter of law)

that this ratification "does not waive our rights which are preserved under [the agreement letters between ACC and Vorys]." *Id.* at 1158.

The settlement closed on December 14, 1993, when ACC put the releases in escrow and USX paid the first $5 million installment of the settlement amount. Pet. App. 32a. ACC was not quite ready to spring its plot against Vorys, and so ACC promptly gave Vorys written authorization to receive its contingent share of the $5 million. The authorization letter, which Silverthorn himself prepared, calculated Vorys's $1,444,340 share according to the precise terms of the contingent-fee contract. *Id.*

At this time, the confirmation action in the federal district court in Ohio was still pending, because USX's $90 million installment of the settlement amount was not yet due. Still, on December 27, 1993, ACC secretly filed suit against Vorys in Harris County, Texas, seeking a declaratory judgment and unspecified damages. ACC did not serve this suit upon Vorys or otherwise inform Vorys of its existence. But having now prepared for his bid to strip Vorys of its contingent fee, Silverthorn sent Vorys a letter stating that "we are discharging your firm effective immediately." C.A. App. 1178.

The next day, unaware of the unserved Texas action, Vorys moved to intervene in the pending confirmation action to protect Vorys's contingent share of the settlement that was about to end that action. On December 29, 1993, the Ohio district court entered two orders. One, to which ACC consented, granted Vorys's motion for leave to intervene and stated that when USX made its $90 million payment on January 3, 1994, Vorys would receive its $22.5 million contingent share without prejudice to whatever rights (if any) ACC might have against Vorys. *Id.* at 153-155. The other order enjoined Vorys and ACC from commencing or pursuing claims against each other in any other forum. *Id.* at 157. ACC withheld its consent

from this latter order, but it did not inform either the district court or Vorys of the unserved suit in Texas. *See* Pet. App. 32a & n.10.[2] Vorys filed its cross-claim against ACC in the Ohio district court that same day.

At that time, ACC's shareholders had created a new Nevada corporation and were in the process of merging the old Ohio corporation out of existence. But the Ohio corporation did not officially disappear until December 30, 1993—one day after Vorys filed its cross-claim. *Id.* at 203. Almost one year later, in December 1994, ACC filed a motion asking the district court to dismiss the intervention proceeding for want of jurisdiction; although ACC and Vorys had indisputably been of diverse citizenship ever since December 30, 1993, ACC argued that they had not been of diverse citizenship on the day that Vorys filed its cross-claim. On June 22, 1995, after vigorous briefing on both sides, the Ohio district court granted ACC's motion and dismissed Vorys's claims against ACC without prejudice. The district court added that the injunction was void. *Id.* at 201-213.[3]

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[2] ACC now criticizes the district court's order as a violation of the Anti-Injunction Act, 28 U.S.C. § 2283. Because ACC failed to disclose the unserved Texas lawsuit either to the district court or to Vorys, the district court could not possibly have known that any pending state litigation existed. *Cf. Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965) (Anti-Injunction Act does not bar injunction against the commencement of state proceedings that are not yet pending). In any event, orders entering or refusing to dissolve injunctions are immediately appealable. *See* 28 U.S.C. § 1292(a)(1). Rather than taking an immediate appeal that would have required it to disclose the existence of the Texas lawsuit, ACC sat tight. ACC also waited nearly a year before filing a motion to dissolve the injunction.

[3] Meanwhile, in January 1995, Vorys had been served with a Plea in Intervention by a person seeking to become a party to the Texas state-court lawsuit. Thirty days later, Vorys removed the Texas action (which still had not been formally served) to federal district court. But on May 5, 1995, the Texas federal court remanded the action back to state court on the grounds that Vorys's

The very next day, Vorys refiled its claims against ACC as an independent action in the Ohio district court. Vorys's complaint sought both compensatory damages and a declaratory judgment. In particular, Vorys sought (1) a money judgment in the amount of more than $2.1 million, representing the unpaid fee on the $8.75 million in matching funds that USX had agreed to put at ACC's disposal, and (2) a declaration that Vorys was entitled to retain the legal fees that it had already received in connection with USX's $90 million payment to ACC. *Id.* at 15-16.

Vorys's complaint was assigned by lot to Chief Judge Holschuh of the Southern District of Ohio. But after ACC asked Judge Holschuh to recuse himself, the action was transferred to Judge Smith, who had handled the confirmation proceeding (and who had ruled in ACC's favor in dismissing Vorys's intervention case).

ACC subsequently moved to dismiss or stay Vorys's Ohio lawsuit in favor of the Texas action. In a thoughtful and well-reasoned opinion, Judge Smith denied this motion. Pet. App. 11a-24a. The district court found that under the "unique circumstances" of this case, "exercise of jurisdiction over this case by this Court will not offend principles of federalism or comity, nor would it constitute gratuitous interference with the state court proceedings." *Id.* at 23a. Pointing out that he "ha[d] dealt with this case from the filing of the confirmation action in December 1992 until the present day," Judge Smith noted the close relationship between Vorys's stand-alone action and the claims that Vorys had attempted to assert in the confirmation action. Although Judge Smith had ultimately held that he lacked jurisdiction to adjudicate Vorys's claims in the confirmation action, "in reaching that con-

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removal had been untimely. Thus, contrary to ACC's suggestion, *see* Pet. 23, Vorys's attempt to remove the federal action occurred well before the Ohio district court dissolved the injunction and dismissed Vorys's intervention case. Vorys's removal efforts did nothing to delay the Texas action.

clusion the Court had occasion carefully to examine and become familiar with the claims Vorys asserts in the instant case." *Id.* at 21a-22a. The Court was also "well-acquainted with the underlying dispute as well as the controversy surrounding the settlement, Vorys' representation, and attorneys' fees." *Id.* at 21a. The "considerable resources" that the Court had already expended on the case "would be largely wasted were it to defer to the Texas state court in this matter." *Id.* By contrast, "[t]he Texas state court case has been virtually inactive since it was filed"; one judge had recused himself, and the new judge "has done nothing more than set the matter for trial by a standard administrative order." *Id.*

Aside from these considerations of judicial economy, the Ohio district court noted that this case concerned the professional conduct of Ohio lawyers in connection with the settlement of a case before it. The Ohio district court noted that "this Court has a strong interest in regulating the conduct of attorneys who practice before it," while the Texas state court "has no such interest in the instant case." *Id.* at 22a.

Texas's interest in the case was further diminished by the fact that the governing law came from Ohio rather than Texas. An Ohio district court is in at least as good a position to apply Ohio law as a Texas state court, and Texas has relatively little sovereign interest in enforcing the laws of other states. The district court made crystal clear the attenuated nature of Texas's connection to the dispute between ACC and Vorys:

> The parties were, during the events that led to the present controversy, both citizens of Ohio, although Energy Buyers' principal place of business was in Houston, Texas. The original contract in the underlying dispute was one to supply natural gas to USX Corporation's facilities at Lorain, Ohio and Haverhill, Ohio. The agreement provided that it was to be construed according to Ohio law, and provided for arbitration in Columbus, Ohio. Energy Buyers re-

> tained an Ohio law firm, Vorys, to represent it in the arbitration that took place in Ohio. Vorys' representation of Energy Buyers before this Court occurred in Ohio. The settlement of the underlying action was consummated in Ohio on January 3, 1994.

Id. Indeed, Texas's connection with the case was so attenuated that there was a significant question as to whether the Texas courts could even exercise personal jurisdiction over Vorys. *Id.*[4] By contrast, there was no question about the Ohio district court's jurisdiction. As for ACC's accusations of forum shopping, the district court tactfully noted that ACC's own efforts to litigate an Ohio dispute in Texas could be construed as "a precipitous race to the courthouse to avoid this Court's jurisdiction." *Id.* at 23a.

After the district court denied ACC's motion to dismiss or stay Vorys's action, ACC filed a counterclaim against Vorys. ACC sought a declaratory judgment of its own (suggesting that this case was indeed fit for federal declaratory relief) as well as a money judgment of more than $90 million. C.A. App. 395-411.

In September 1995 (before the district court ruled on the motion to dismiss or stay), Vorys had filed a motion for summary judgment on its own claims. On February 14, 1996, it filed a similar motion for summary judgment on ACC's counterclaim. These motions were fully briefed and ready for decision by March 21, 1996. Meanwhile, trial in the Texas state court was not scheduled to begin until June 1996.

On April 22, 1996, the Texas court issued a most peculiar order. The order stated that although the Texas

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[4] The petition incorrectly states that the Texas trial court had already issued an interlocutory order stating that it did have personal jurisdiction over Vorys. Pet. 8. The Texas trial court did not find personal jurisdiction until *after* the Ohio district court had decided not to dismiss or stay Vorys's suit.

court would not be able to begin jury selection until June 18, 1996, the case would nonetheless "be considered 'in trial' as of May 3, 1996." C.A. App. 612. The Ohio district court, which had previously ordered the parties to keep it apprised of developments in Texas, learned of this order on April 24, 1996. *Id.* at 610-611. One day later, it issued a long and carefully reasoned opinion—which it had obviously been working on for some time—granting Vorys's motion for summary judgment. Pet. App. 25a-42a.

The court held that even if one resolved all genuine factual disputes in ACC's favor, ACC had ratified Vorys's allegedly unauthorized conduct. Consistent with the Restatement (2d) of Agency, the court further concluded that under Ohio law, ACC could not ratify the settlement as to USX without also ratifying it as to Vorys; subject to certain exceptions that were not applicable here, ratification frees agents from liability to their principal and entitles them to the same rights against the principal as if their acts had been authorized. *Id.* at 37a & n.13. The court therefore granted the declaratory relief that Vorys had sought.

As for Vorys's claim for a money judgment, Vorys had argued that the term "recovery" in the parties' contract should be interpreted to include the $8.75 million in matching charitable contributions that USX had agreed to make at ACC's direction. ACC had not challenged this argument in its briefs, and the district court agreed with Vorys that under the plain language of the contract, ACC still owed Vorys $2,187,500. The court entered final judgment in that amount, and also awarded Vorys the prejudgment interest that it had sought. *Id.* at 42a. ACC subsequently sought reconsideration on these points, but the district court properly rejected ACC's belated (and meritless) arguments. *Id.* at 44a.

In an unpublished opinion, a panel of the United States Court of Appeals for the Sixth Circuit unanimously af-

firmed the district court's judgment. The Sixth Circuit devoted the bulk of its opinion to ACC's arguments on the merits, which ACC has elected not to press before this Court. *See id.* at 6a-10a. With respect to whether the district court should have exercised its undisputed jurisdiction in the first place, the Sixth Circuit simply stated that under the particular facts of this case, the district court did not abuse its discretion. *Id.* at 5a-6a. ACC subsequently sought rehearing *en banc* on various issues, but no judge even called for a vote on this suggestion. *Id.* at 45a.

REASONS FOR DENYING THE PETITION

In arguing that the district court should have abstained from this "declaratory judgment action," the petition wholly ignores the fact that Vorys sought (and won) *both* declaratory relief *and* contract damages. Under the circumstances, no circuit in the country would have held that the district court abused its discretion when it elected to hear Vorys's case.

I. BECAUSE OF THE PARTIES' COMPETING CLAIMS FOR MONETARY DAMAGES, THIS CASE DOES NOT PRESENT THE QUESTION STATED IN THE PETITION.

The general rule "is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.' " *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" by Congress and the Constitution, and only "the clearest of justifications" will warrant abstention. *Id.* at 817-819.

In *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), this Court acknowledged a narrow exception to *Colorado River* for "actions brought under the Declaratory Judg-

ment Act, 28 U.S.C. § 2201(a)." *Id.* at 286. The Court reasoned that the Declaratory Judgment Act is phrased in discretionary terms: it states that federal courts "may" enter declaratory judgments in cases within their jurisdiction. *Id.* Because the language of the Act gives district courts "unique and substantial discretion in deciding whether to declare the rights of litigants," the Court inferred that it must also give district courts broader-than-usual discretion about whether to entertain declaratory judgment actions in the first place. *Id.* at 286-287. As the Court observed, the contrary position "depends on the untenable proposition that a district court, knowing at the commencement of litigation that it will exercise its broad statutory discretion to decline declaratory relief, must nonetheless go through the futile exercise of hearing a case on the merits first." *Id.* at 287.

Wilton is a perfect example of an "action[] brought under the Declaratory Judgment Act." In *Wilton*, the plaintiff insurers had no claims against their insured, but simply wanted a declaration that the insured had no valid claims against them. Without the Declaratory Judgment Act, they could not have brought suit in federal court, because they could not have asserted any cognizable claim for relief.

By contrast, Vorys's suit would have been in federal court with or without the Declaratory Judgment Act. Vorys was seeking (and won) not only a declaration of its right to retain the fees that it had already collected, but also a sizable award of contract damages for fees that were owed but remained unpaid.[5] Because ACC and

[5] Aware that this fact is fatal to its petition, ACC tries to rewrite history. ACC never mentions that Vorys's suit sought millions of dollars in contract damages. Instead, ACC repeatedly (and falsely) portrays Vorys's suit as a pure declaratory judgment action. *See, e.g.*, Pet. 3 ("Vorys Sater brought a declaratory judgment action in federal district court in Ohio, requesting a declaration that it was not liable to CitiGas and was permitted to retain its $22.5 million contingent fee."). The petition even portrays the district court's

Vorys were of diverse citizenship, there is no question that Vorys could have sued ACC in federal court for $2,187,500 plus accumulated interest. *See* 28 U.S.C. § 1332 (establishing, at the time of Vorys's suit, a $50,000 jurisdictional amount for diversity cases). There is also no question that the district court would have had a "virtually unflagging obligation" to exercise its jurisdiction over such a suit, despite the pendency of the Texas proceedings. *Colorado River*, 424 U.S. at 817.

The mere fact that a complaint includes a claim for declaratory relief does not transform a case from one that the federal courts have a "virtually unflagging obligation" to hear into one that they have broad discretion to dismiss or stay. To the contrary, in *Colorado River* itself the United States was seeking a declaration of its rights (pursuant to the Declaratory Judgment Act) along with the additional relief of an injunction and the appointment of a water master. *See id.* at 805; *Wilton*, 515 U.S. at 283-284. Because the United States could have sought this additional relief in federal court with or without the Declaratory Judgment Act, *Colorado River* was not an "action[] brought under the Declaratory Judgment Act" within the meaning of *Wilton*. *See Wilton*, 515 U.S. at 286.[6]

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award of $2,187,500 plus prejudgment interest as some sort of gratuitous comment in a footnote, rather than a money judgment on an issue that Vorys had pleaded and argued. *See* Pet. 9. The record, of course, belies ACC's attempt at spin control.

[6] For the sake of internal consistency, ACC is forced to ignore *Wilton*'s express observation that *Colorado River* did not involve an "action[] brought under the Declaratory Judgment Act." *See* Pet. 13 (describing *Colorado River* as "a declaratory judgment action"). To explain the fact that the district court had a "virtually unflagging obligation" to exercise jurisdiction in *Colorado River*, ACC stresses that jurisdiction rested on 28 U.S.C. § 1345 (which gives the district courts original jurisdiction over suits commenced by the United States) rather than 28 U.S.C. § 1332 (which gives the district courts original jurisdiction over suits commenced between diverse parties). ACC does not even attempt to explain why this distinction should make a difference.

Under the *Colorado River* test, the district court had a "virtually unflagging obligation" to entertain both Vorys's claim for $2.1 million in contract damages and ACC's counterclaim for $90 million. The district court awarded Vorys the full amount that ACC still owed, and it dismissed ACC's counterclaim on the merits.

By virtue of the Declaratory Judgment Act, the district court did enjoy extra discretion over whether to grant Vorys the *additional* relief of a declaration stating Vorys's right to retain the fees that Vorys had already received. But since the district court had to resolve the parties' competing claims for monetary relief anyway, there would have been little point in withholding a declaratory judgment. In fact, the district court's disposition of the parties' competing monetary claims—a disposition that ACC does not ask this Court to review on the merits—effectively moots any question about whether the district court should have abstained from entering declaratory relief. With or without a declaratory judgment, the district court's decision to award Vorys $2,187,500 and to reject ACC's counterclaims would have had *res judicata* effects in Texas.

Both the Fifth and the Ninth Circuits—on which ACC's claims of a circuit split rest—have endorsed this analysis. In *Polido v. State Farm Mutual Automobile Insurance Co.*, 110 F.3d 1418 (9th Cir. 1997), the plaintiff had originally sought both a declaratory judgment and monetary relief. The Ninth Circuit expressly stated that the district court had a virtually unflagging obligation "to exercise its jurisdiction over the *monetary* claims exceeding $50,000 in Celeste Polido's complaint against State Farm." The Ninth Circuit added that if Polido had not voluntarily dismissed her monetary claims, "a proper concern for judicial economy would have weighed in favor of the district court's exercise of its discretionary jurisdiction over the state law claims for declaratory relief." *Id.* at

1421.[7] The Ninth Circuit has followed the same analysis in counterclaim situations, when one party seeks purely declaratory relief but the other party seeks money dam-

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[7] In its recent unpublished opinions, the Ninth Circuit has repeatedly echoed this analysis. *See Polonitza v. Chubb Group of Ins. Cos.*, 1997 WL 367926 (9th Cir. July 2, 1997) ("The Polonitzas' original complaint included claims for monetary relief, over which the district court was obliged to exercise diversity jurisdiction. Because those claims would have required the district court to resolve the same state law coverage issues, the district court's decision to exercise jurisdiction over the declaratory relief claim was clearly appropriate."); *Ark Telecommunications, Inc. v. State Farm Fire & Cas. Co.*, 1997 WL 355891 (9th Cir. June 27, 1997) ("Although a district court has discretion to decline to hear declaratory relief claims, it has no discretion to decline claims for monetary relief. Because the district court in this case had to retain appellee's claims for monetary relief, it had an obligation to retain the declaratory relief claims."); *Smith Mailer Mfg. v. Liberty Mut. Ins. Co.*, 1997 WL 407862 (9th Cir. July 21, 1997) (same).

The Ninth Circuit's earlier treatment of contribution claims raised by insurance companies is not to the contrary. In *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796 (9th Cir. 1995), Employers Reinsurance Corporation (ERC) sued both its insured and Transamerica Insurance Company in federal district court. As far as the insured was concerned, ERC's claims were purely declaratory: ERC was seeking a declaratory judgment stating that it had no duty to defend its insured in some state-court litigation. If the district court disagreed with it on this point, however, ERC wanted (1) a declaratory judgment stating that Transamerica was also obliged to defend the insured and (2) an order requiring Transamerica to contribute to the defense costs being incurred by ERC. The Ninth Circuit held that this contingent request for contribution did not make the lawsuit "one for a money judgment rather than declaratory relief." *Id.* at 801. After all, "[t]he complaint asks the district court to rule on a request that Transamerica pay its share of defense costs only if it first declares that ERC has a duty to defend Karussos." *Id.* Without the Declaratory Judgment Act, ERC could not have brought its claim for monetary relief in federal court, because it did not actually think that Transamerica owed it any money; if ERC indeed had no duty to defend its insured, then it had no claim against Transamerica. *Cf. Golden Eagle Ins. Co. v. Travelers Cos.*, 103 F.3d 750 (9th Cir. 1996) (applying *Karussos* to another insurance case that included a contribution claim of unspecified amount).

ages. *See, e.g., Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir. 1991). In the present case, of course, *both* the plaintiff and the defendant were seeking money damages far in excess of the jurisdictional amount for diversity cases.

The Fifth Circuit has also rejected ACC's position. In *Southwind Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 948 (5th Cir. 1994), the plaintiff sought both declaratory relief and damages. Although the district court characterized the plaintiff's suit as a "declaratory judgment action," the Fifth Circuit held that this characterization was wrong as a matter of law. Because the plaintiff had requested not only a declaratory judgment but also "coercive remedies for the breach of contract in the form of damages, attorney's fees, and injunctive relief," the district court had a "virtually unflagging obligation" to exercise jurisdiction over the plaintiff's suit. *Id.* at 951 (quoting *Colorado River*).

If anything, then, the standard applied by the district court in this case was too favorable to ACC. The district court had a "virtually unflagging obligation" to decide the parties' competing claims for monetary relief, and no circuit in the country would have held that it abused its discretion when it also decided their competing claims for declaratory relief.

II. EVEN IF THIS CASE *WERE* A PURE DECLARATORY JUDGMENT ACTION, IT STILL WOULD NOT IMPLICATE ANY CIRCUIT SPLIT.

Even if Vorys had been proceeding solely under the Declaratory Judgment Act and had not sought $2.1 million in money damages, and even if ACC had not filed its own counterclaims for money damages, this case still would not have implicated any circuit split. Only two-and-a-half years ago, this Court—following the plain language of the Declaratory Judgment Act—held that the Act gives federal courts "unique and substantial discretion in deciding whether to declare the rights of litigants."

Wilton, 515 U.S. at 286-287 (noting "the statute's textual commitment to discretion, and the breadth of leeway we have always understood it to suggest"). The Court added that district courts are in the best position to decide whether to entertain a declaratory judgment action, because the relevant facts "are peculiarly within their grasp." *Id.* at 289.

ACC suggests that the Fifth and Ninth Circuits nonetheless enforce a strong presumption against entertaining any case in which (1) the federal complaint asks for a declaration of rights (regardless of whether it also seeks other relief), (2) a parallel complaint was filed in a state court before the federal complaint (regardless of whether the federal court has dealt with a prior incarnation of the case and regardless of the comparative stage of the proceedings when the federal court is asked to defer), and (3) the issues in both proceedings involve state law (regardless of whether they have anything to do with the law of the state in which the parallel proceeding is pending). The cases simply do not support these extravagant claims.

The Ninth Circuit has recognized a rebuttable presumption against exercising diversity jurisdiction over certain declaratory judgment actions involving insurance issues. *See Government Employees Ins. Co. v. Dizol*, 108 F.3d 999, 1012 (9th Cir.) (Schroeder, J., dissenting) (criticizing the Ninth Circuit's "presumption against federal jurisdiction in diversity insurance litigation"), *reh'g en banc granted*, 118 F.3d 661 (9th Cir. 1997).[8] But the Ninth

[8] When the Ninth Circuit granted rehearing in *Dizol* on June 26, 1997, it did not purport to limit its review to any particular issue. Indeed, rather than ordering re-briefing on any particular question, the Ninth Circuit simply directed the parties to submit twenty copies of the original briefs. *See* Order (June 27, 1997). Two weeks before oral argument, the Court directed the parties to be prepared to discuss whether courts must raise the discretionary nature of the Declaratory Judgment Act on their own motion.

Circuit has not applied this presumption outside of the insurance context. *See Employers Reins. Corp. v. Karussos*, 65 F.3d 796, 799 (9th Cir. 1995) (noting that two prior Ninth Circuit cases stating the presumption "involved disputes about insurance coverage, as have most, if not all of the published cases in other circuits in which courts have declined to exercise their jurisdiction over requests for a declaration of state law because of a related state court proceeding").[9] In explaining the presumption, moreover, the Ninth Circuit has stressed arguments that are specific to insurance. *See Karussos*, 65 F.3d at 799 (invoking the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. § 1012(a)); *Polido*, 110 F.3d at 1423 (same); *see also American Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1017 (9th Cir. 1995) (noting danger of resolving cases on the undeveloped records common in declaratory insurance actions). Indeed, the Ninth Circuit has indicated that its presumption against diversity insurance litigation is similar to the law applied in the Sixth Circuit, from which this case arises. *See*

Contrary to the petition's suggestion, however, the Court has not stated that it will limit its comments to that issue. *Cf.* Pet. 19 n.24.

[9] The only non-insurance Ninth Circuit case cited by ACC is *Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166 (9th Cir. 1997). Contrary to ACC's suggestion, *see* Pet. 19, that decision did not invoke any "presumption" against the exercise of jurisdiction, does not conflict with the decisions of any other circuit, and has no bearing on this case. *Exxon* arose after certain cases pending in state court were improperly removed to federal court. Prior to the removal, the state court had indicated that it might reach a legal conclusion with which the federal district court disagreed. The district court therefore entered a declaratory judgment stating, in effect, that if the actions were ultimately remanded to the state court, legal rulings made by the district court at the summary-judgment stage would nonetheless be binding in the state proceedings. Because federal district courts lack jurisdiction to review the decisions of state courts, the Ninth Circuit held that the district court should not have entered its strange declaratory judgment.

Karussos, 65 F.3d at 799; *Hungerford*, 53 F.3d at 1016-1017.

Even if one really could treat this case as a "declaratory judgment action" despite the parties' competing claims for monetary relief, the Sixth Circuit's unpublished opinion would not conflict with the Ninth Circuit's insurance cases. First and foremost, this case does not involve insurance. Second, even in the insurance context, the Ninth Circuit has not called for federal courts presumptively to defer to *all* pending state proceedings, but only to proceedings in the state whose law is at issue; this case indisputably is governed entirely by Ohio law, and no related proceeding has ever been filed in the Ohio state courts. Third, even under the Ninth Circuit's insurance cases, a district court's decision to exercise jurisdiction is not a ground for reversal when the district court has already rendered final judgment and reached the right answer on the merits. *Golden Eagle Ins. Co. v. Travelers Cos.*, 103 F.3d 750, 756 (9th Cir. 1996). Here, the court of appeals concluded that the district court did indeed reach the right answer, and ACC is not seeking review of this conclusion.

As for the Fifth Circuit, ACC does not cite a single post-*Wilton* case from that circuit. Like other courts, the Fifth Circuit has read *Wilton* to mean what it says. In the Fifth Circuit's own words, "[a] district court has broad discretion to retain or dismiss a declaratory judgment suit where a parallel state court suit has been filed. The breadth of this discretion was recently reaffirmed by the Supreme Court in *Wilton v. Seven Falls Co.*" *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 84 (5th Cir.) (citations omitted), *cert. denied*, 118 S. Ct. 69 (1997). Post-*Wilton* cases from the Fifth Circuit make no mention of any "presumption" against exercising jurisdiction.

ACC's contrary argument rests on a handful of Fifth Circuit cases that all were decided before *Wilton*. *See* Pet. 14-15 n.14. In *Texas Employers' Insurance Asso-*

ciation v. Jackson, 862 F.2d 491 (5th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989), an insurance company—dissatisfied with pretrial rulings made by a state court in pending litigation against the company—asked a federal district court to issue an injunction or a declaratory judgment effectively reversing those rulings. *Id.* at 505. The Fifth Circuit held that declaratory judgments should not be used for this purpose. *Id.* at 505-506; *cf. supra* n.9. In subsequent *dicta*, the Fifth Circuit expanded upon this conclusion, while nonetheless refusing to require abstention in the cases at hand. *See Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 776 (5th Cir. 1993); *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993), *cert. denied*, 511 U.S. 1032 (1994). The Fifth Circuit, however, has given no indication that its comments in these cases survive *Wilton*. Even before *Wilton*, moreover, it did not apply these cases when litigants sought damages as well as declaratory relief. *See Southwind Aviation*, 23 F.3d at 951. The "conflict" cited by ACC is entirely imaginary.[10]

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[10] There is a reason why no circuit has adopted the position favored by ACC: that position is clearly wrong on the merits. In an effort to justify its attack on diversity jurisdiction, ACC invokes the "values" underlying 28 U.S.C. § 1446 (which limits the time within which defendants must exercise their power to remove actions from state to federal court) and 28 U.S.C. § 2283 (which limits the power of federal courts to enjoin proceedings that are pending in a state court). But the removal power and the injunction power are far different from the power simply to adjudicate a case or controversy that unquestionably comes within federal jurisdiction. Both the removal power and the injunction power involve the coercive use of federal authority to halt state proceedings. By contrast, Congress has long been content to let federal courts exercise power within their sphere at the same time that state courts are exercising power within their sphere. The mere fact that state courts will give *res judicata* effects to federal judgments (and vice versa) does not violate any principles of federalism. *See, e.g., Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922).

III. THE "UNIQUE CIRCUMSTANCES" OF THIS CASE MAKE IT A PARTICULARLY POOR CANDIDATE FOR CERTIORARI.

Finally, the question raised by ACC makes no difference to the outcome of this case. ACC argues that the district court should have exercised jurisdiction only if it found "extraordinary circumstances." *See* Pet. i. But the district court *did* find such circumstances. *See* Pet. App. 23a (finding that under the "unique circumstances" of this case, "the matter can be addressed more effectively in this Court than in the Texas state court" and the exercise of federal jurisdiction "will not offend principles of federalism or comity").

The circumstances stressed by the district court were fully in keeping with this Court's emphasis on "considerations of practicality and wise judicial administration." *See Wilton*, 515 U.S. at 288. The district court noted that this dispute grew out of the confirmation action over which it had presided. Pet. App. 21a. Likewise, in reaching its decision to rebuff Vorys's first attempt to invoke federal jurisdiction, the district court had necessarily examined the parties' claims. *Id.* at 21a-22a.[11] All in all, the district court had "expended considerable resources on this case," which "would be largely wasted were it to defer to the Texas state court in this matter." *Id.* at 21a. By contrast, "[t]he Texas state court case has been virtually inactive since it was filed." *Id.*[12] Independent of any other consid-

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[11] The petition claims that the Ohio district court should have disregarded the work that it had done in the intervention proceedings, because it ultimately concluded that it lacked jurisdiction over Vorys's claims in those proceedings. But the district court unquestionably had jurisdiction to decide whether it had jurisdiction. In any event, "considerations of practicality and wise judicial administration" certainly did not require the district court to disregard the fact that it was farther along the learning curve than the Texas court.

[12] ACC attributes the inactivity of the Texas case to the injunction that the district court voided in June 1995, six months before

erations, then, the priority factor actually favored the district court's exercise of jurisdiction, because "[i]n realistic terms, the federal suit was running well ahead of the state suit." *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

It is clear, too, that Vorys's invocation of federal jurisdiction was not a reaction to ACC's unserved Texas lawsuit. Vorys had intervened in the confirmation action while ACC was still keeping the unserved Texas suit secret from both Vorys and the district court, and Vorys's standalone action was a continuation of the issues that Vorys had attempted to raise in the confirmation action. *Id.* at 22a.

Other considerations made it far more natural for the dispute between ACC and Vorys to be resolved in the Ohio district court than in the Texas state courts. The dispute concerned the conduct of an Ohio law firm in representing what was then an Ohio corporation in connection with an action pending before the Ohio district court. The dispute was governed entirely by Ohio law, and the Ohio district court had an indisputable interest in policing the conduct of the members of its bar. *Id.* In addition, one of the principal issues concerned the proper allocation of settlement proceeds that had been distributed under the Ohio district court's supervision and order. By contrast, Texas's connection to the dispute was so attenuated that Vorys may not even have been subject to personal jurisdiction there. *Id.*

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the district court commented upon the dormancy of the Texas litigation. But ACC had only itself to blame for the injunction; if it had not concealed the Texas case's existence from the district court, it would not have faced this problem. Even after the district court entered the injunction on December 29, 1993, moreover, ACC was in no hurry to call the unserved Texas case to the court's attention. ACC did not appeal the injunction, and it waited until December 2, 1994, to file a motion asking for the injunction to be dissolved. *See supra* n.2.

Because the district court has already held that this case presents "unique circumstances" justifying the exercise of jurisdiction, ACC is reduced to arguing that the court should have come to different conclusions on the particular record presented here. *See, e.g.*, Pet. 7-8 (erroneously claiming that the Texas case was not so inactive as the district court thought); Pet. 24 (questioning "the district court's supposed familiarity with the underlying issues" and the amount of work that the district court had done on the confirmation case). Such factual issues obviously do not merit this Court's review.

CONCLUSION

ACC suggests that when a federal court is asked to exercise its diversity jurisdiction over a "declaratory judgment action" (which ACC somehow defines to include an action that seeks more than $2.1 million in money damages), the court should apply a one-factor test: if a parallel action in state court was filed before the federal complaint, then the federal court generally has no discretion to hear the case. According to ACC, then, the mere filing of a complaint in any state court effectively enjoins the initiation of separate federal litigation. No circuit in the country has adopted this peculiar rule, and there is no reason for this Court to review the Sixth Circuit's unpublished opinion. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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